

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, et. al.)	NO. CV-08-5074-LRS
)	
Plaintiffs,)	
)	
-vs-)	ORDER GRANTING CMG'S
)	MOTION FOR SUMMARY JUDGMENT
COMMONWEALTH MARKETING GROUP, INC.,)	
et. al.,)	
)	
Defendants.)	
)	
-vs-)	
)	
IMG ASSOCIATES, LLC,)	
)	
Third Party Defendants.)	

BEFORE THE COURT is Defendant Commonwealth Marketing Group, Inc.'s ("CMG") Motion for Summary Judgment Against IMG Associates, LLC ("Impulse") (ECF No. 121) filed on August 8, 2011, and heard with telephonic argument on September 27, 2011.¹ With the benefit of oral argument and briefing from both CMG and Impulse, the Court enters the following order, which is designed to memorialize and supplement the oral rulings of the Court on September 27, 2011.

Third Party Defendant IMG Associates LLC ("Impulse,) was the exclusive provider of internet marketing services for Third Party Plaintiff Commonwealth Marketing Group, Inc. during the period

¹Mr. Gordon did not participate in the telephonic hearing.

1 relevant this case. According to CMG, the parties' Marketing
2 Agreement contains an indemnity clause under which Impulse agreed to
3 defend CMG against any claims arising out of violations of the
4 CAN-SPAM Act of 2003 and other laws governing the transmission of
5 commercial e-mail.

6 Impulse disputes this interpretation of the Marketing Agreement.
7 Impulse argues that the duty to defend arises only from a breach or
8 default on the part of IMG in the observance or performance of any
9 obligation, covenant, condition or provision of the Marketing
10 Agreement.

11 The Court found that the duty to defend arises when an arguable
12 claim arises, as occurred under the facts of this case. To accept
13 Impulse's interpretation, the Court would have to ignore the literal
14 meaning of the terms "claim" and "shall defend," which it cannot do.
15 The provision at issue reads:

16 14. Indemnification

17 (a) IMG **shall** indemnify, **defend**, (with legal counsel
18 reasonably acceptable to IMF), and hold CMG and its
19 officers, directors, shareholders, agents, affiliates and
20 assigns ("CMG et al") harmless at all times after the
21 Effective Date of this Agreement, from and against and in
22 respect of, **any** liability, **claim**, deficiency, loss, damage,
23 penalty, or injury, and all reasonable costs and expenses
24 (including attorney's fees and costs of any suit related
25 thereto) received, suffered or incurred by CMG et al arising
26 from (i) any breach or default on the part of IMG in the
observance or performance of obligation, covenant, condition
or provision of this Agreement, (ii) any act outside the
scope of IMG's duties in connection with the marketing or
distribution of the Program, (iii) any breach by IMG (or any
of IMG's marketing affiliates, after receipt by IMG of the
notice from CMG of potential violations by such affiliates,
or upon proof that IMG otherwise was aware of such
violations) of the CAN-SPAM Act of 2003, insofar as it
relates, to services provided by IMG, pursuant to this
Agreement, (iv) any misrepresentation by, or breach of any
covenant or warranty of IMG contained in this Agreement or

1 any instrument furnished or to be furnished by IMG
2 hereunder.

3 ECF No. 124-1, Exh. C [emphasis added.]

4 There is no dispute that Mr. Gordon's statutory claims were
5 covered under the Marketing Agreement's indemnity clause. Mr.
6 Gordon's e-mail production was evidence that Impulse transmitted the
7 e-mails at issue in this case. Impulse rejected CMG's tender under
8 Clause 14(a) based on the merits of the claims. This Court, however,
9 concluded that Plaintiff Gordon lacked standing for his CAN-SPAM Act
10 claims. The Court further found Gordon's state claims under the
11 Commercial Electronic Mail Act ("CEMA"), Chapter 19.190 RCW, were
12 preempted as Gordon had not adequately pleaded nor developed the
13 record to allege fraud as part of his CEMA claims. See ECF No. 91.

14 Impulse's position is contrary to the law governing the parties'
15 Agreement. Under that law, Georgia law, the duty to defend arose when
16 Mr. Gordon alleged statutory violations of the CAN-SPAM Act; the merit
17 of those claims is irrelevant. See *Penn-America Ins. Co. v. Disabled*
18 *Am. Veterans Inc.*, 481 S.E.2d 850, 852 (Ga. Ct. App. 1997) *aff'd*
19 *490 S.E.2d 372* (Ga. 1997). The duty to defend is a separate and
20 distinct obligation from the duty to indemnify and the duty to defend
21 is broader. *Shafe v. Am. States Ins. Co.*, 653 S.E.2d 870, 873 (Ga.
22 Ct. App. 2007). Georgia courts look to the allegations in the
23 complaint and if the facts alleged even arguably bring the occurrence
24 within coverage, the indemnitor has a duty to defend the action.
25 *Landmark Am. Ins. Co. v. Khan*, 705 S.E.2d 707, 710 (Ga. Ct. App. 2011).
26 Indeed, it was Impulse's duty to prove that there were no statutory
violations of the CAN-SPAM Act of 2003. Impulse's refusal to defend

1 was a breach of the Marketing Agreement, which damaged CMG forcing it
2 to incur \$131,938.93 in defense costs.

3 Under Georgia law, the duty to defend arises when a covered claim
4 is made, regardless of merit. The Court finds that Impulse breached a
5 duty to defend CMG. As a result of Impulse's breach, CMG incurred
6 \$131,938.93 in legal expenses defending against Mr. Gordon's claims.
7 A party that breaches its duty to defend is liable to reimburse the
8 attorneys' fees and costs incurred by the other party in defense of
9 the covered claims. The Court enters a summary judgment in the amount
10 of \$131,938.93 against Impulse.

11 Accordingly, **IT IS ORDERED** that:

12 1. Defendant Commonwealth Marketing Group, Inc.'s Motion for
13 Summary Judgment Against IMG Associates, LLC, **ECF No. 121**, filed on
14 August 8, 2011, is **GRANTED. Judgment is entered against Third Party**
15 **Defendant IMG Associates, LLC in the amount of \$131,938.93.**

16 2. The District Court Executive shall prepare and enter a
17 judgment consistent with this order.

18 3. The District Court Executive shall CLOSE THIS FILE.

19 **IT IS SO ORDERED.** The District Court Executive is directed to
20 enter this Order, and provide copies to counsel and pro se plaintiff.

21 **DATED** this 28th day of September, 2011.

22 ***s/Lonny R. Suko***

23 _____
24 LONNY R. SUKO
25 UNITED STATES DISTRICT JUDGE
26